No. 17-432

IN THE
# Supreme Court of the United States

CHINA AGRITECH, INC.,
*Petitioner,*

v.

MICHAEL H. RESH, ET AL.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENTS WILLIAM SCHOENKE, HEROCA HOLDING, B.V., AND NINELLA BEHEER, B.V.


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## QUESTION PRESENTED

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), this Court held that "the commencement of a class action suspends the applicable statute of limitations as to *all asserted members of the class* who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554 (emphasis added).

The question presented is:

Whether plaintiffs whose individual claims are timely as a result of *American Pipe* tolling also may bring those claims in a subsequent class action on behalf of all class members who also had timely claims under the *American Pipe* rule.

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## INTRODUCTION

Petitioner and respondents start from the same premise. Under the class-tolling rule first recognized by this Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and reaffirmed last Term, "'the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class.'" *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017) (quoting *American Pipe*, 414 U.S. at 554). Because of the tolling effect of earlier timely class actions, petitioner never has disputed that the named plaintiffs' claims here were timely, and every class member had a timely claim that it could have asserted individually at the time that respondents filed their class-action complaint.

Petitioner parts with respondents and the court below in asserting that class members' claims (that concededly would have been timely if asserted individually) should be deemed untimely simply because they were asserted as a class action. Petitioner's position contravenes Federal Rule of Civil Procedure 23 and the Rules Enabling Act. Rule 23 "creates a categorical rule" entitling a plaintiff who meets Rule 23's criteria to move for class certification and "*automatically* applies" in all federal civil actions. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398, 400 (2010). Federal courts cannot impose a new requirement that class members not rely on class tolling to prove timeliness, nor can they exclude such cases from class consideration. Moreover, petitioner's position that individual plaintiffs can rebut a limitations defense by showing inclusion in an earlier class action, but class plaintiffs cannot, "ignore[s] the Rules Enabling Act's pellucid instruction that use of the

class device cannot 'abridge ... any substantive right.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016) (quoting 28 U.S.C. § 2072(b)) (ellipsis in original). A straightforward application of those legal strictures should be sufficient to affirm the Ninth Circuit's judgment.

A long line of this Court's precedents provides additional support. From *American Pipe* itself to *CalPERS v. ANZ* last Term, this Court's cases confirm that a timely class action suspends the statute of limitations for all class members, whether they subsequently assert their claims individually or as a class. The Court has explained the *American Pipe* rule as a means of ensuring that Rule 23 operates as intended – to prevent the need for class members to make duplicative filings that would destroy the "'litigative efficiency and economy'" of class actions. *ANZ*, 137 S. Ct. at 2051 (quoting *American Pipe*, 414 U.S. at 556). That same logic applies in the context of subsequent class actions. Absent tolling, class members would file duplicative class actions to protect the ability to proceed as a class.

Tolling for subsequent class actions, no less than tolling for subsequent individual claims, is "in accord with 'the functional operation of a statute of limitations.'" *Id.* (quoting *American Pipe*, 414 U.S. at 554). Class members included in a timely class action "cannot be accused of sleeping on their rights." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983). And a timely class action puts defendants on fair notice of potential liability in a subsequent class action asserting similar claims. Thus, even if petitioner were correct that class members had to show diligence and that tolling furthers Rule 23's policies, respondents have done so.

At bottom, petitioner's flawed legal contentions boil down to a policy argument: that, unless this Court recognizes a new limitation on class tolling, rampant "abusive" filing of "stacked" class actions will follow, creating "perpetual tolling" of limitations periods. Pet. Br. 46-48. This Court rejected an identical policy argument in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), concluding that a preclusive bar against subsequent class actions was unnecessary because comity and other tools of judicial administration were sufficient curbs on potential abuse. Since *Smith*, comity has proven to be a workable means for lower courts to decide which subsequent class actions should and should not go forward. Further, in securities class actions such as this one, perpetual tolling is literally impossible, because the statute of repose serves as an absolute cutoff of liability. Unsurprisingly, even though for many years many circuits have permitted class tolling, petitioner cites zero evidence that its parade of horribles has come to pass. The Court should reaffirm, consistent with its repeated holdings, that a timely class action suspends the limitations as to *all* asserted class members, and reject petitioner's invitation to erect a new limitation on class tolling.

## STATEMENT

### A. Statutory And Doctrinal Background

Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), as implemented by Securities and Exchange Commission ("SEC") Rule 10b-5, prohibits fraudulent statements and schemes in connection with the purchase or sale of securities. *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

"As courts have frequently noted, class action treatment is particularly appropriate when plaintiffs seek redress for violations under the securities laws." *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 91-92 (S.D.N.Y. 2007) (collecting cases). In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), this Court "held that securities fraud plaintiffs can in certain circumstances satisfy the reliance element of a Rule 10b-5 action by invoking a rebuttable presumption of reliance, rather than proving direct reliance on a misrepresentation." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2408 (2014); *see id.* at 2407-13 (rejecting contention that *Basic* should be overruled). The presumption of reliance "facilitates class certification" of securities fraud class actions, because it allows reliance to be proven through classwide proof. *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 462-63 (2013).

This presumption applies if the stock trades in an efficient market and the plaintiff purchased stock between the time that a material, public misrepresentation was made and when the truth was revealed. *See Halliburton*, 134 S. Ct. at 2408. Lower courts determining whether a stock trades in an efficient market frequently look to factors discussed in *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989): (1) average weekly trading volume; (2) number of securities

analysts that follow the stock; (3) whether the stock had numerous market makers; (4) the company's eligibility to file a registration statement under SEC Form S-3; and (5) the existence of a cause-and-effect relationship between unexpected corporate news and changes in the stock price. *Id.* at 1286-87. Class certification of securities fraud class actions often turns on whether plaintiffs can prove market efficiency, typically through statistical event studies performed by experts. *See Halliburton*, 134 S. Ct. at 2412, 2415.

In *Lampf, Pleva, Lipkind, Prupis & Petrigrow v. Gilbertson*, 501 U.S. 350 (1991), this Court held that a 1-year limitations period and 3-year repose period applied to Rule 10b-5 claims. *Id.* at 364. The Sarbanes-Oxley Act of 2002 extended the applicable time bars for Rule 10b-5 actions to a 2-year statute of limitations and a 5-year statute of repose. *See* 28 U.S.C. § 1658(b) (securities fraud actions "may be brought not later than the earlier of . . . (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation"). This case concerns the 2-year statute of limitations period of § 1658(b).

**B. Factual And Procedural Background**

1. Petitioner was a holding company whose subsidiaries purportedly manufactured and sold organic compound fertilizers in China. JA47 (¶ 3). Petitioner was incorporated in Delaware with its principal place of business in Beijing, China. JA50 (¶ 19). In 2005, petitioner became listed on the NASDAQ stock exchange through a "reverse merger." JA51 (¶ 21). In a reverse merger, a public shell company acquires a private company, and, in exchange, shareholders of the private company obtain a controlling share of the public company. This device, which foreign companies

frequently employ to achieve listing on an American stock exchange without undergoing the regulatory scrutiny of an initial public offering, enables a private company to acquire the stock listing of the shell company. *Id.*

Respondents allege that petitioner made material false and misleading statements, beginning on November 12, 2009, as part of a wide-ranging scheme that fraudulently misrepresented nearly all of petitioner's reported revenue and earnings. JA46-48 (¶¶ 1, 4).[1] Petitioner's quarterly and annual reports significantly overstated its revenues and net income, JA60-61 (¶¶ 47-53), as shown by the fact that petitioner reported significantly lower revenues and income to Chinese authorities, JA61-70 (¶¶ 54-71). Respondents' pre-suit investigation unearthed further evidence of fraud, including shuttered and dormant factories and shell company suppliers owned by parties affiliated with company insiders. JA70-72, 78-82 (¶¶ 73, 100-104).

A series of corrective disclosures revealed petitioner's fraud. On February 3, 2011, a market research report (the "LM Report") entitled "China Agritech: A Scam" was published. JA85-86 (¶ 111); *see* SJA20-46 (LM Report). This report asserted that petitioner's financial statements were fraudulent and that many of petitioner's factories were idle. JA86 (¶ 112); SJA21-34. Another report on February 15, 2011, presented further evidence of the fraud. JA86-87 (¶ 118); SJA47-51. In March 2011, petitioner announced the formation of a special committee to investigate fraud allegations and further announced that the company's

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[1] At the motion-to-dismiss stage, this Court takes plaintiffs' factual allegations as true. *See, e.g., Walden v. Fiore*, 134 S. Ct. 1115, 1119 n.2 (2014).

auditor had resigned, citing concerns about the accuracy of the company's financial representations. JA87-88 (¶¶ 120-121). Petitioner's stock price dropped significantly following each corrective disclosure; overall, it dropped from $10.78 on February 2, 2011, to $6.88 on March 14, 2011, when NASDAQ delisted petitioner's stock and halted trading. JA86-87, 89 (¶¶ 113, 119, 124). Petitioner's stock price continued to drop in pink sheet trading, to $3.00 on May 23, 2011, and $0.16 on October 16, 2012. JA90 (¶¶ 126-128).[2]

**2.** On February 11, 2011, Theodore Dean and other shareholders ("Dean") filed a class-action complaint; as amended, the complaint asserted claims against petitioner and certain officers, directors, underwriters, and auditors, on behalf of a putative class of all investors who purchased petitioner's stock from November 12, 2009, through March 11, 2011 (the "class period"). *See Dean v. China Agritech, Inc., et al.*, No. 2:11-cv-1331-RGK (C.D. Cal.) ("*Dean* Action"). Dean alleged claims for violations of § 10(b) and § 20(a) of the Exchange Act and Rule 10b-5 against petitioner and other company insiders, and for violations of the Securities Act of 1933 ("Securities Act") against some of petitioner's executives, directors, underwriters, and auditors. JA162-72 (¶¶ 123-168). Dean alleged the same fraudulent conduct that forms the basis of respondents' claims. *Compare* JA60-104 (¶¶ 47-147) (*Resh*) *with* JA133-58 (¶¶ 42-114) (*Dean*); *see also* Pet. Br. 1 (describing class actions as "identical"). It is undisputed that the *Dean* Action was timely,

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[2] On October 17, 2012, the SEC revoked the registration of petitioner's stock for repeated securities law violations (including failure to make required disclosures) and ordered petitioner to cease and desist from committing such violations. SJA52-57.

because it was filed just 8 days after discovery of the violation and less than 5 years after the alleged violations. *See* 28 U.S.C. § 1658(b); Pet. App. 11a.[3]

Pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4, two separate investor groups sought appointment as lead plaintiffs. The PSLRA states that, within 90 days of publication of notice of a securities class action, "the court shall consider any motion made by a purported class member . . . and shall appoint" a lead plaintiff deemed the "most adequate plaintiff." *Id.* § 78u-4(a)(3)(B)(i). The district court denied both motions and stated it would not appoint lead plaintiffs until "the time of certification." SJA1-6, 7-11.

On October 27, 2011, the district court (Judge Klausner) granted in part and denied in part petitioner's motions to dismiss. *See* Order Denying Mots. To Dismiss, *Dean* Action, Dkt. 85 (Oct. 27, 2011). The court dismissed the Securities Act claims but held that Dean stated valid Exchange Act claims. *Id.*

On January 6, 2012, Dean moved for class certification under Rule 23(b)(3). *See* Pls.' Mot. for Class Certification, *Dean* Action, Dkts. 94-96 (Jan. 6, 2012). On May 3, 2012, the district court denied the motion. JA177-92. The court first held that Dean satisfied the numerosity, commonality, typicality, and adequacy requirements of Rule 23(a). JA184-86. The court addressed whether Dean had proven market efficiency to invoke the presumption of reliance, considering the factors articulated in *Cammer v. Bloom*, 711 F. Supp.

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[3] For purposes of the limitations period, discovery occurred on February 3, 2011, the date of the LM Report. For purposes of the repose period, the first alleged violation occurred no earlier than November 12, 2009, the start of the class period and the date of the first alleged misrepresentation.

at 1286-87. JA188. The court held that the first, third, and fourth *Cammer* factors supported market efficiency: large trading volume, sufficient market makers, and ability to file a registration statement. JA189-90. But the court concluded that Dean's expert had failed to satisfy the second *Cammer* factor (analyst coverage) because, although he concluded that many analysts covered petitioner's stock, he had not provided enough background information about these analysts. JA190. With respect to the fifth *Cammer* factor – effect of news on stock price – one of Dean's experts submitted an event study showing a statistically significant relationship between company news and stock price movement. JA191. But the court concluded that this expert's findings were inconsistent with findings of Dean's other expert. *Id.* On that basis, the court found "that Plaintiffs are unable to establish that Agritech stock was treated on an efficient market." JA192.

After the Ninth Circuit denied Dean's Rule 23(f) petition for interlocutory review, *see* Order from Ninth Circuit, *Dean* Action, Dkt. 16 (Aug. 8, 2012), Dean settled with petitioner and other defendants on an individual basis, *see* Stipulation for Dismissal with Prej. Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), *Dean* Action, Dkt. 204 (Sept. 18, 2012).

**3.** On October 4, 2012, Kevin Smyth and other shareholders ("Smyth") filed a new complaint in the District of Delaware. *See* Pet. App. 7a. The *Smyth* plaintiffs asserted substantially the same claims under the Exchange Act and Rule 10b-5 (omitting the Securities Act claims dismissed in *Dean*) on behalf of the same class as those alleged in *Dean*, represented by the same counsel. Pursuant to defendants' motion to transfer under 28 U.S.C. § 1404(a), the action was

transferred to the Central District of California, where it was deemed related to *Dean* and assigned to Judge Klausner. *See* Pet. App. 7a; *Smyth v. Yu Chang, et al.*, No. 2:13-cv-3008-RGK (C.D. Cal.) ("*Smyth* Action"). It is undisputed that *Smyth* was timely, because it was filed less than 2 years after discovery (the February 3, 2011 LM Report) and less than 5 years after the earliest alleged violation (November 12, 2009). *See* 28 U.S.C. § 1658(b); Pet. App. 11a.

Pursuant to the PSLRA, three separate investor groups sought appointment as lead plaintiffs. Judge Klausner did not rule on these motions until ruling on plaintiffs' later class-certification motion. JA265.

A group of plaintiffs moved for class certification. JA249. They attached an expert report that sought to remedy the deficiencies identified in the *Dean* class certification motion. *See* Decl. of Howard J. Mulcahey, *Smyth* Action, Dkt. 89-1 (Aug. 5, 2013). The report included extensive discussion of analyst coverage of petitioner's stock and attached seven analyst reports as exhibits. *Id.* ¶¶ 31-48, Exhs. 6-12. With respect to the effect of news on stock price, the expert performed 15 separate statistical analyses to demonstrate market efficiency, including several event studies. *Id.* ¶¶ 65-143. In opposing class certification, petitioner did not argue that the *Smyth* plaintiffs had failed to show that common issues predominated over individual issues, nor did petitioner submit an expert report to rebut plaintiffs' expert; petitioner argued solely that the district court should follow its class-certification denial in *Dean* under principles of comity and that the *Smyth* plaintiffs failed the typicality and adequacy requirements. *See* China Agritech, Inc.'s Opp. to Pls.' Mot. for Class Certification at 9-20, *Smyth*

Action, Dkt. 93 (Aug. 13, 2013) ("China Agritech Class Cert. Opp., *Smyth* Action, Dkt. 93").

On September 26, 2013, the district court denied the class-certification motion. JA248-49. The court determined that the *Smyth* class representatives failed the typicality requirement because their alleged shared control of the *Dean* Action subjected them to unique claim preclusion defenses. JA255-60. The court also determined that the *Smyth* plaintiffs were inadequate class representatives because they had not demonstrated sufficient engagement with the litigation. JA260-62.

The district court considered and rejected petitioner's alternative argument that it should deny class certification on the basis of the *Dean* class-certification denial and "principles of comity." JA264. The court reasoned:

> Even if this action is materially identical to *Dean*, it is not clear that the reason the Court denied class certification in *Dean* applies equally to this case. In *Dean* the Court held that Plaintiffs had failed to establish that questions of law or fact common to the class predominated over individual questions, as required under Rule 23(b)(3). That holding was based on a finding that one of the Plaintiffs' own experts had failed to demonstrate market efficiency. Plaintiffs in this action have submitted entirely new expert declarations. Given the different factual showings in each case, it would be improper to decide class certification issues based solely on comity.

*Id.*

Following the court's ruling, the *Smyth* plaintiffs settled with petitioner on an individual basis.

4. On June 30, 2014, respondents (represented by different counsel than counsel in *Dean* and *Smyth*) filed a class action in the instant case in the Central District of California against petitioner and several individual defendants (the *Resh* Action). Plaintiffs asserted Exchange Act and Rule 10b-5 claims premised on the same false statements alleged in *Dean* and *Smyth*. The *Resh* Action was transferred to Judge Klausner after respondents identified it as related to *Dean* and *Smyth*.

It is undisputed that the *Resh* Action was filed within the statute of repose, because it was filed within 5 years of the first alleged violation on November 12, 2009. *See* 28 U.S.C. § 1658(b)(2). It also is undisputed that the *Resh* Action was filed within the 2-year statute of limitations if that statute was tolled during the pendency of the *Dean* Action and the *Smyth* Action until the respective denials of class certification in each action under the rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974); and that, without the benefit of tolling from both actions, the *Resh* Action would be untimely under the statute of limitations. Pet. App. 11a-12a.

Respondents moved for appointment as lead plaintiffs within the time period set by the PSLRA. *See Resh* Action, Dkts. 22, 23 (Sept. 3, 2014). As in *Dean* and *Smyth*, the district court declined to appoint a lead plaintiff until "the time of certification." SJA63.

Petitioner subsequently moved to dismiss the *Resh* Action in its entirety as time-barred or, in the alternative, to strike the class allegations. The district court dismissed the action as untimely on the basis of its status as a class action. Pet. App. 36a. The court believed that it was constrained by Ninth Circuit precedent, *Robbin v. Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987), to hold that a class action could never toll

the statute of limitations for a subsequent class action following denial of class certification. Pet. App. 31a-35a.

The district court subsequently concluded that the named plaintiffs "[we]re not prevented from filing a complaint asserting individual, rather than class action, claims . . . if they so choose." SJA65. The court denied respondents' motion for reconsideration of its dismissal order. Pet. App. 38a-44a.

**5.** The Ninth Circuit reversed the district court's order dismissing the *Resh* Action as untimely. The court began by noting that, under *American Pipe* and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 34 (1983), "it is clear that the individual claims of the would-be class members in the *Resh* Action have been tolled during the pendency of earlier class actions." Pet. App. 14a.

The Ninth Circuit concluded that "[t]hree recent Supreme Court decisions have confirmed [its] view" that respondents could assert the tolled claims on behalf of the class under Rule 23. *Id.* at 17a. In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), this Court "rejected an argument . . . that only certain categories of claims are eligible for class treatment under Rule 23." Pet. App. 17a. Under *Shady Grove*, Rule 23 cannot "'be set aside when a suit's timeliness depends on a tolling rule.'" *Id.* at 18a (quoting *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 564 (7th Cir. 2011) (Easterbrook, C.J.)).

The Ninth Circuit next found support in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), in which this Court rejected an argument that class-certification denials must preclude subsequent class actions to avoid "'serial relitigation of class certification.'" Pet. App. 19a (quoting *Smith*, 564 U.S. at 316).

Finally, the Ninth Circuit cited this Court's decision in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), which concluded that it would violate the Rules Enabling Act to hold that representative proof that was admissible to prove individual claims could not be used to prove class claims. Pet. App. 20a. *Tyson Foods* "reinforce[d] [the court's] conclusion that the statute of limitations does not bar a class action brought by plaintiffs whose individual actions are not barred." *Id.* at 21a.

The Ninth Circuit concluded that "permitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling would advance the policy objectives that led the Supreme Court to permit tolling in the first place." *Id.*

Moreover, the Ninth Circuit concluded that "the current legal system is adequate to respond to" a concern about "abusive filing of repetitive class actions." *Id.* at 22a. Where a previous class-certification denial makes it "clear that a proposed class is not viable under Rule 23, . . . potential future plaintiffs (or, more precisely, their attorneys) will have little to gain from repeatedly filing new suits." *Id.* Further, "ordinary principles of preclusion and comity will further reduce incentives to re-litigate frivolous or already dismissed class claims, and will provide a ready basis for successor federal district courts to deny class certification." *Id.*

Petitioner's petitions for panel rehearing and rehearing *en banc* were denied without dissent. Pet. App. 46a.

## SUMMARY OF ARGUMENT

**I.A.** It is undisputed that every class member had a timely individual claim. Petitioner acknowledges that, under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), a timely class action suspends the limitations period, at least as to subsequent individual claims by class members. Even under petitioner's view of *American Pipe*, any of the class members could have brought a timely individual claim at the time the *Resh* class action was filed.

**B.** The question in this case is whether class members with timely individual claims may maintain them as a class action. The answer is yes, so long as they satisfy the requirements of Rule 23. Rule 23 "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action" and "*automatically* applies" in all civil actions. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398-400 (2010). Petitioner impermissibly attempts to add a requirement to Rule 23 that class members may not rely on class tolling to demonstrate timeliness.

**C.** To hold that the class members' timely individual claims were untimely because they were asserted as a class action would violate the Rules Enabling Act. Under that Act, evidence "relevant in proving a plaintiff's individual claim . . . cannot be deemed improper merely because the claim is brought on behalf of a class." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016). Petitioner's position that valid proof of timeliness of an individual claim (inclusion in an earlier class action) becomes invalid to prove timeliness of an identical class claim "ignore[s] the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive

right.'" *Id.* (quoting 28 U.S.C. § 2072(b)) (ellipsis in original).

**II.A.** Class tolling is a doctrine rooted in "the traditional equitable powers of the judiciary" that this Court crafted to "further[] 'the purposes of litigative efficiency and economy' served by Rule 23." *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051, 2052 (2017) (quoting *American Pipe*, 414 U.S. at 556). This Court recognized that tolling was necessary for Rule 23 class actions to function as intended. Without tolling, class members would be induced to make duplicative filings to protect their rights, destroying the judicial efficiency that class actions were meant to foster.

The Court also recognized that class tolling "was in accord with 'the functional operation of a statute of limitations.'" *Id.* at 2051 (quoting *American Pipe*, 414 U.S. at 554). Putative class members who benefit from tolling "cannot be accused of sleeping on their rights" because they are entitled to rely on the class action to protect those rights. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352-53 (1983). Class tolling is fair to defendants because the timely class action notifies them of the claims against them. *See ANZ*, 137 S. Ct. at 2051.

**B.** This Court consistently has held that a timely class action "suspends the applicable statute of limitations as to *all asserted members of the class* who would have been parties had the suit been permitted to continue as a class action." *American Pipe*, 414 U.S. at 554 (emphasis added). *Crown, Cork* clarified that *American Pipe* did not create a limited rule applicable only to a specific procedural context, but instead recognized a broadly applicable tolling rule that benefited all class members.

This Court has applied class tolling in a variety of procedural contexts, never limiting the scope of its tolling of limitations periods. The Court consistently has noted that class tolling benefits all asserted members of the class. Accordingly, respondents seek a faithful application of this Court's class-tolling precedents, not an extension of them, as petitioner erroneously contends.

**C.** The Court's rationales for class tolling apply fully when tolling is applied to a subsequent class action. Class tolling is intended to prevent the need for class members to make duplicative filings to protect their rights. The same deleterious effect would occur if class tolling did not apply to subsequent class actions, because class members would have the incentive to file duplicative, protective class actions.

The *American Pipe* Court concluded that class tolling was consistent with the policies underlying statutes of limitations. The same is true when class tolling is applied to subsequent class actions. Statutes of limitations are designed to "bar[] a plaintiff who 'has slept on his rights,'" *American Pipe*, 414 U.S. at 554 (quoting *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965)), but "th[is] end[] [is] met when a class action is commenced," *Crown, Cork*, 462 U.S. at 352-53. Any burden of diligence is satisfied by the filing of the original class action. Even if a class member were required to demonstrate further diligence after class treatment were denied in the first action, the filing of the subsequent class action on the class member's behalf would satisfy that burden.

Moreover, as in *American Pipe*, a timely class action gives defendants fair notice of the claims in a subsequent class action, as defendants can hardly claim

unfair surprise when faced with a class action asserting identical claims as an earlier, timely class action.

**III.A.** Petitioner mistakenly contends that the Court must impose a new equitable limitation on *American Pipe* because the application of class tolling to subsequent class actions purportedly does not satisfy requirements of plaintiff diligence and extraordinary circumstances justifying tolling. Petitioner's equitable arguments cannot overcome the force of Rule 23 and the Rules Enabling Act, which dictate that valid individual claims cannot be deemed invalid simply because they are asserted as a class action.

Moreover, because class tolling is motivated by judicial efficiency, rather than fairness to plaintiffs, the requirements of diligence or extraordinary circumstances do not apply in the same manner as in other equitable tolling cases. *See ANZ*, 137 S. Ct. at 2051. To the extent these requirements do apply, they are satisfied here. The filing of the original class action (and certainly the filing of the subsequent class action) on the class member's behalf satisfies any burden of diligence. Petitioner concedes that furtherance of the policies of Rule 23 is an "extraordinary circumstance" justifying tolling. Class tolling furthers Rule 23's policies just as much when applied to class actions as it does when applied to individual actions.

**B.** Petitioner's policy concerns about "abusive," "stacked" class actions "perpetual[ly]" extending the statute of limitations, Pet. Br. 46-48, are largely invented. This Court already considered and dismissed petitioner's policy argument in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), when it held that comity and other tools of judicial administration were sufficient to address policy concerns regarding relitigation of class-certification denials. Since *Smith*, lower courts

have shown that they can apply comity to deny class treatment early in a case, without discovery, where appropriate. But comity does not preclude certification of a subsequent class action "when the basis for the earlier denial . . . is no longer present in a subsequent proceeding." Am. Law Inst., *Principles of the Law of Aggregate Litigation* § 2.11 cmt. c (2010). That is the case here, where the class-certification denial in *Dean* hinged on a specific failure of proof in the plaintiffs' expert report, which was remedied in the subsequent actions, and the denial in *Smyth* was based on specific concerns about adequacy of representation limited to the proposed representatives in that case.

In securities class actions and other lawsuits subject to a statute of repose, the statute of repose serves as an outer limit to liability. *See ANZ*, 137 S. Ct. at 2051. Thus, perpetual tolling is impossible.

Given the mechanisms available to limit relitigation of class certification, it is unsurprising that petitioner advances no evidence of "abusive," "stacked" class actions in circuits that have applied class tolling to subsequent class actions for years. This lack of evidence shows that petitioner's concerns "likely are overstated." *Id.* at 2054.

**IV.** Petitioner's position would lead to inequitable outcomes in many cases. Denying tolling when class certification is denied because of a plaintiff-specific reason serves no equitable purpose. Moreover, even where certification is denied for a class-based reason, a subsequent class action that incorporates the court's guidance to cure the identified deficiency should be allowed to proceed. Comity, rather than a new limitation on class tolling, provides the appropriate mechanism for district courts to determine which subsequent class actions should go forward.

## ARGUMENT

### I. UNDER RULE 23, CLASS MEMBERS ARE ENTITLED TO BRING THEIR TIMELY INDIVIDUAL CLAIMS AS A CLASS ACTION

#### A. As Petitioner Concedes, Each Class Member Had A Timely Individual Claim Under *American Pipe* And *Crown, Cork*

Under the *American Pipe* rule, every member of the *Resh* class action had a timely individual claim that it could have filed at the time of the *Resh* class complaint. This Court held in *American Pipe* that a timely class-action lawsuit "tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." 414 U.S. at 553. In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Court clarified that "[t]he filing of a class action tolls the statute of limitations 'as to all asserted members of the class,' not just as to intervenors." *Id.* at 350 (quoting *American Pipe*, 414 U.S. at 554). Thus, a class member who files a separate individual lawsuit is entitled to the benefit of tolling. *See id.* at 353-54.

Petitioner does not argue that *American Pipe* or *Crown, Cork* should be overruled, at least insofar as they apply to individual claims. To the contrary, petitioner argues at length that these decisions correctly held that a class action tolls the limitations period for subsequent individual claims. *See* Pet. Br. 26-28, 30-31, 33-34, 37-38.

Thus, even under petitioner's view of the law, each class member here had a timely claim. The *Dean* and *Smyth* class actions were undisputedly timely, *see supra* pp. 7-8, 10, and therefore "stop[ped] the limitations clock." *Artis v. District of Columbia*, 138 S. Ct.

594, 602 (2018). Accounting for this suspension, the limitations clock had been running for just 439 days at the time of the *Resh* complaint, well under two years. *See* Appellant C.A. Br. Ex. A. It thus is undisputed that, had any class member filed a lawsuit on the date of the *Resh* complaint, it would have been timely. *See* SJA65 ("Plaintiffs are not prevented from filing a complaint asserting individual . . . claims . . . if they so choose."); Pet. App. 11a-12a (because it is "undisputed that . . . the statute of limitations for the individual claims of would-be class members in the *Dean* and *Smyth* Actions was tolled during the pendency of both of those actions, . . . there is no time bar to individual claims brought by plaintiffs who were unnamed class members in the *Dean* and *Smyth* Actions").

### B. Because These Class Members Have Timely Individual Claims, They May Maintain Them As A Class Action If They Satisfy The Requirements Of Rule 23

The question in this case is whether the class members, each of whom had timely individual claims, may maintain them as a class action. As this Court recently held, "Rule 23 provides an answer" to this question: "It states that '[a] class action may be maintained' if" the requirements of Rule 23(a) and (b) are satisfied. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (quoting Fed. R. Civ. P. 23(b)) (alteration in original). As noted in *Shady Grove*, "[t]he Federal Rules regularly use 'may' to confer categorical permission, as do federal statutes that establish procedural entitlements." *Id.* at 398-99 (citing Fed. R. Civ. P. 8(d)(2)-(3), 14(a)(1), 18(a)-(b), 20(a)(1)-(2), 27(a)(1), 30(a)(1); 29 U.S.C. § 626(c)(1); 42 U.S.C. § 2000e-5(f)(1)). Because "[c]ourts do not maintain actions; litigants do," Rule 23's statement

that a class action "may be maintained" confers discretion on "the plaintiff: He may bring his claim in a class action if he wishes," in "each and every case where the Rule's criteria are met." *Id.* at 399-400. Rule 23 thus "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Id.* at 398-99.

In *Shady Grove*, this Court rejected the defendant's contention that class certification should be unavailable when barred by a state statute. *Id.* at 405-06. "[L]ike the rest of the Federal Rules of Civil Procedure, Rule 23 *automatically* applies 'in all civil actions and proceedings in the United States district courts.'" *Id.* at 400 (quoting Fed. R. Civ. P. 1).

Under Rule 23, as interpreted by *Shady Grove*, plaintiffs with viable individual claims are automatically entitled to maintain them as a class action if they meet the Rule 23(a) and Rule 23(b) requirements. Federal courts cannot cite "some *other* law" to create additional obstacles to class treatment. *Id.* at 399. But that is exactly what petitioner proposes to do. According to petitioner, class treatment is unavailable based on a requirement found nowhere in Rule 23: that class members not rely on class tolling for the timeliness of their claims. *See* Pet. App. 17a ("*Shady Grove* directs us, for purposes of class certification, to look only to the criteria of Rule 23 and not to 'some other law.' There is nothing in the certification criteria of Rule 23 that tells us to look to whether the statute of limitation has, or has not, been tolled."). This view that "Rule 23 must be set aside when a suit's timeliness depends on a tolling rule . . . cannot be reconciled with [*Shady Grove*], which holds that Rule 23 applies to all federal civil suits, even if that prevents achieving some other objective that a court

thinks valuable." *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 564 (7th Cir. 2011) (Easterbrook, C.J.).

Petitioner's attempts to avoid the force of *Shady Grove* are unpersuasive. Petitioner disputes (at 52) the premise "that every absent class member is entitled to *American Pipe* tolling," asserting that *American Pipe* protects only those who file individual claims. This contention is incorrect and irrelevant. Class tolling benefits "'all asserted members of the class,'" *Crown, Cork*, 462 U.S. at 350 (quoting *American Pipe*, 414 U.S. at 554), not just some, as petitioner argues. *See infra* Part II. Moreover, petitioner concedes that the class members' claims *would be timely if asserted individually*. *See* Pet. Br. 52; China Agritech, Inc.'s Reply in Support of Mot. To Dismiss the *Resh* Pls.' Putative Class Action or, in the Alternative, Class Allegations as Barred by Statute of Limitations at 9, *Resh* Action, Dkt. 40 (Oct. 20, 2014) (petitioner "does not oppose" class members bringing individual claims). Petitioner's argument that timely individual claims may not be maintained as a class action even if Rule 23 is satisfied contradicts Rule 23 and *Shady Grove*.

### C. The Rules Enabling Act Mandates That Timely Individual Claims Cannot Be Deemed Untimely Because They Are Asserted As A Class Action

Petitioner argues (at 52-53) that, in crafting tolling rules to determine the validity of limitations defenses, courts are free to differentiate between class actions and individual actions, holding that the same defense that is invalid as to an individual claim is valid as to an identical class claim. However, such a holding would violate the Rules Enabling Act, which requires

that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). As the Court recognized in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), the Rules Enabling Act dictates that the validity of a claim or defense cannot turn on whether a claim is asserted individually or as a class action.

In *Tyson Foods*, employees brought a class action, claiming that the employer had denied all employees at a plant required overtime compensation for time spent donning and doffing protective equipment. *Id.* at 1042. Because the employer had not kept individual records for each employee, the class offered representative proof of damages, in the form of a statistical study of employees' donning and doffing time. *Id.* at 1043-44. Under longstanding Supreme Court precedent, representative proof was an acceptable method for an individual employee to prove damages when the employer had violated its statutory duty to keep records. *See id.* at 1047 (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)). The employer nonetheless argued that "representative evidence" could not be used to prove damages in a class action. *Id.* at 1046.

This Court rejected the employer's argument as contrary to the Rules Enabling Act. Validity of proof of a claim or defense "turns not on the form a proceeding takes – be it a class or individual action – but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." *Id.* Where evidence "is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class." *Id.*; *see also Shady Grove*, 559 U.S. at 408 (plurality) ("A class action, no less than

traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.").

Petitioner's position here similarly violates the Rules Enabling Act. As petitioner acknowledges, if the *Resh* class members had pursued their claims under Rule 3 (individual complaint), Rule 20 (joinder with named *Resh* plaintiffs), or Rule 24 (intervention), they would be able to overcome petitioner's limitations defense with proof that they were asserted class members in the timely *Dean* and *Smyth* actions.[4] Yet petitioner contends that this same proof should be deemed invalid in rebutting a limitations defense for identical claims asserted under Rule 23. This position "ignore[s] the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.'" *Tyson Foods*, 136 S. Ct. at 1046 (quoting 28 U.S.C. § 2072(b)) (ellipsis in original). Accordingly, petitioner's argument (at 52) that the Rules Enabling Act *requires* differentiating between individual claims and class claims when assessing timeliness must be rejected.

Moreover, in *American Pipe*, this Court held that class tolling did not violate the Rules Enabling Act because it was "consonant with the legislative scheme." 414 U.S. at 558. Petitioner is thus mistaken

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[4] *See, e.g.*, Mem. in Support of China Agritech, Inc.'s Mot. To Dismiss the *Resh* Pls.' Putative Class Action or, in the Alternative, Class Allegations as Barred by Statute of Limitations at 9, *Resh* Action at 20, Dkt. 28-1 (Sept. 22, 2014) (stating that petitioner "welcomes the opportunity to defend itself" against individual claims brought by class members).

(at 52) that applying class tolling to subsequent class actions would violate that Act because class members would benefit from tolling "simply because another class action was filed."

*American Pipe* also rejected petitioner's argument (at 45-46) that tolling is inconsistent with the separation of powers. The Court concluded that prior cases in which it had tolled limitations periods "fully support the conclusion that the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." 414 U.S. at 559. Petitioner cites no authority for the proposition that the separation of powers allows for tolling of subsequent individual actions, but not for subsequent class actions. *American Pipe*'s separation-of-powers analysis also is consistent with more recent cases explaining that Congress legislates against the backdrop of a "presumption" that its statutes are subject to equitable tolling. *See, e.g., United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1630-31 (2015).

## II. UNDER THIS COURT'S PRECEDENTS, TOLLING APPLIES FOR ALL PUTATIVE CLASS MEMBERS

This Court's precedents confirm and implement the principles of Rule 23 and the Rules Enabling Act requiring class tolling. In *American Pipe* and other cases, this Court crafted a tolling doctrine, in the exercise of its equitable powers, to ensure that Rule 23 achieved the judicial economy of representative litigation intended by its framers. The rationales behind this Court's class-tolling precedents do not depend on the procedural form of the subsequent action and

apply fully to subsequent class actions. This Court therefore consistently has held that a class action tolls the statute of limitations as to *all* asserted members of the class, not just some members, as petitioner contends.

### A. Class Tolling Is A Doctrine, Rooted In This Court's Equitable Powers, To Facilitate The Judicial Economy Of Rule 23 Class Actions

In *American Pipe*, this Court held that "'the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class.'" *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017) (quoting *American Pipe*, 414 U.S. at 554). In the exercise of "the traditional equitable powers of the judiciary," this Court crafted a class-tolling rule in order to "further[] 'the purposes of litigative efficiency and economy' served by Rule 23." *Id.* at 2051, 2052 (quoting *American Pipe*, 414 U.S. at 556). The Court recognized that class tolling was necessary for a Rule 23 class action to operate as intended, as "a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *American Pipe*, 414 U.S. at 550. "Without the tolling, '[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable,' which would 'breed needless duplication of motions.'" *ANZ*, 137 S. Ct. at 2051 (quoting *American Pipe*, 414 U.S. at 553-54); *see also Crown, Cork*, 462 U.S. at 349 (class tolling designed "[t]o protect the policies behind the class-action procedure").

The Court also concluded that "tolling was in accord with 'the functional operation of a statute of limitations.'" *ANZ*, 137 S. Ct. at 2051 (quoting *American Pipe*, 414 U.S. at 554). From the plaintiff's perspective, limitations periods further the "polic[y] . . . of barring a plaintiff who 'has slept on his rights.'" *American Pipe*, 414 U.S. at 554 (quoting *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965)). But that policy is "satisfied" when a class representative "commences a suit" within the limitations period. *Id.* at 554-55. *Crown, Cork* reaffirmed that "[l]imitations periods are intended . . . to prevent plaintiffs from sleeping on their rights, but th[is] end[] [is] met *when a class action is commenced. Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights.*" 462 U.S. at 352-53 (emphasis added; citations omitted).

Tolling also is fair to defendants and consistent with a statute of limitations' purpose of ensuring that defendants have fair notice of claims. "By filing a class complaint within the statutory period, the named plaintiff 'notifie[d] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.'" *ANZ*, 137 S. Ct. at 2051 (quoting *American Pipe*, 414 U.S. at 555) (alteration in original).

In sum, class tolling is an equitable rule designed to further the judiciary's institutional interest in "'litigative efficiency and economy,'" "consistent . . . 'with the proper function of the limitations statute'" to ensure that defendants have timely notice of the claims against them. *ANZ*, 137 S. Ct. at 2051 (quoting *American Pipe*, 414 U.S. at 555-56).

### B. This Court Repeatedly Has Held That A Timely Class Action Suspends The Statute Of Limitations For All Asserted Members Of The Class

From *American Pipe* to last Term's *ANZ* decision, this Court consistently has held that a class action suspends the statute of limitations period for *all* class members, not just some, as petitioner erroneously contends. In *American Pipe*, this Court held that "the commencement of a class action suspends the applicable statute of limitations as to *all asserted members of the class* who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554 (emphasis added).

In *Crown, Cork*, this Court clarified that *American Pipe* did not create a limited rule applicable only to the procedural context of that case (motions to intervene), but instead recognized a broadly applicable tolling principle. The plaintiff in *Crown, Cork* was a class member in an employment discrimination class action who brought a separate individual lawsuit after class certification was denied. 462 U.S. at 347-48. In holding that the plaintiff was entitled to tolling, the Court rejected the defendant's attempt to limit class tolling to the specific procedural context of intervention. "While *American Pipe* concerned only intervenors, . . . the holding of that case is not to be read so narrowly." *Id.* at 350. Rather, "[t]he filing of a class action tolls the statute of limitations 'as to all asserted members of the class,' not just as to intervenors." *Id.* (quoting *American Pipe*, 414 U.S. at 554).

Petitioner twists *Crown, Cork*'s holding beyond recognition in asserting that, when the Court said "all asserted class members, not just intervenors," it meant "intervenors and individual filers, but no one

else." *See* Pet. Br. 27-28. Rather, this Court has applied class tolling in a wide variety of procedural circumstances: moving to intervene in a former class action following denial of class certification, *American Pipe*, 414 U.S. at 561; filing an individual action after opting out, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974); intervening to appeal denial of class certification after a final judgment, *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 391 (1977); filing a separate lawsuit, *Crown, Cork*, 462 U.S. at 354; and applying class tolling to a situation in which state law provided the limitations period that was tolled, *Chardon v. Fumero Soto*, 462 U.S. 650, 654 (1983). The Court never has limited *American Pipe* to specific procedural forms or held that any forms of subsequent action are excluded.

Furthermore, the Court often has repeated, as recently as last Term, the conclusion that a timely class action tolls the limitations period for *all* asserted class members, without limitation. *See ANZ*, 137 S. Ct. at 2051 (*American Pipe* "held the individual plaintiffs' motions to intervene were timely because 'the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class'") (quoting *American Pipe*, 414 U.S. at 554). That statement rested on a wealth of precedent. *See Eisen*, 417 U.S. at 176 n.13 (*American Pipe* "established that commencement of a class action tolls the applicable statute of limitations as to all members of the class"); *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) ("Nonnamed class members are, for instance, parties in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them."); *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 226 n.6 (2012) ("In *American Pipe*, we held that

'commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.'") (quoting *American Pipe*, 414 U.S. at 554); *see also Chardon*, 462 U.S. at 665 (Rehnquist, J., dissenting) (*American Pipe* established "a general federal tolling rule grounded on Rule 23" that applies to "'all asserted members of the class who would have been parties had the suit been permitted to continue as a class action'") (quoting *American Pipe*, 414 U.S. at 554).[5]

Indeed, *Devlin*'s holding that unnamed class members may object to and appeal the approval of a class settlement rested in part on the *American Pipe* rule, which this Court cited as authority for the proposition that, even though unnamed class members are not full parties, they retain some rights associated with parties. *See Devlin*, 536 U.S. at 9-11. Both of these rights – tolling and the ability to object and appeal – protect class members from being prejudiced by the outcome of a class action, and both rights are possessed by all class members.

Not once has the Court repudiated its repeated holding that a timely class action suspends the statute

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[5] Petitioner notes (at 29-30) that this Court occasionally has described the specific results of *American Pipe* and *Crown, Cork* as allowing individual intervention motions or lawsuits to proceed. But the Court never has suggested, let alone held, that class tolling is limited to such circumstances. Petitioner's selective quotations omit vital context. For example, while *ANZ* stated that *American Pipe* allowed "ensuing individual actions to proceed," 137 S. Ct. at 2054-55, it explained that "the individual plaintiffs' motions to intervene were timely because 'the commencement of a class action suspends the applicable statute of limitations as to *all asserted members of the class*,'" *id.* at 2051 (quoting *American Pipe*, 414 U.S. at 554) (emphasis added).

of limitations for all asserted class members, nor has the Court ever held that a timely class action suspends the statute of limitations only for some asserted class members. Accordingly, respondents ask for no more than a faithful application of this Court's class-tolling precedents. In falsely contending (at 4) that respondents seek an "extension of *American Pipe*," petitioner masks its own gambit to seek a new judicially imposed, atextual limitation on Rule 23 to preclude class tolling of a limitations period for all asserted class members.

### C. The Rationales Justifying Class Tolling Apply Fully To Subsequent Class Actions

Beyond the Court's consistent characterization of class tolling as a doctrine that benefits all class members, the equitable principles underlying this Court's class-tolling cases demonstrate that class tolling applies to subsequent class actions. As the Ninth Circuit recognized, "permitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling would advance the policy objectives that led the Supreme Court to permit tolling in the first place." Pet. App. 21a.

1. The foundational rationale of class tolling is that a Rule 23 class action operate as intended, as a device to achieve "efficiency and economy of litigation." *American Pipe*, 414 U.S. at 553. In *Crown, Cork*, the Court recognized that the same potential harm that *American Pipe* sought to prevent – duplicative filings – would occur if the Court restricted the procedural form of class members' subsequent actions. If class tolling were limited by procedural form and a putative class member believed that the available procedural forms were suboptimal, "[a] putative class

member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result would be a needless multiplicity of actions – precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." 462 U.S. at 350-51.

The same deleterious effect would result from a judge-made rule excluding subsequent class actions from *American Pipe*. As petitioner acknowledges, its proposed rule encourages the filing of duplicative class actions, because class members concerned that the existing class representative will be unsuccessful in achieving class certification will have the incentive to file a protective class action before the limitations period expires. *See* Pet. Br. 35-36 (arguing that filing a duplicative class action during the limitations period is required for a class representative to demonstrate diligence). Applying class tolling to subsequent class actions "promotes economy of litigation by reducing incentives for filing duplicative, protective class actions." Pet. App. 21a.[6]

Petitioner nonetheless asserts (at 39-40) that its rule will not increase the number of duplicative filings because, even with class tolling, some class members will file duplicative class actions anyway because they

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[6] *See also* Rhonda Wasserman, *Tolling: The* American Pipe *Tolling Rule and Successive Class Actions*, 58 Fla. L. Rev. 803, 854 (2006) (limiting class tolling to individual claims "would invite the very precautionary filing of either individual lawsuits or dueling class actions during the pendency of the original class action that *American Pipe* and *Crown, Cork* sought to discourage"); Tanya Pierce, *Improving Predictability and Consistency in Class Action Tolling*, 23 Geo. Mason L. Rev. 339, 363 (2016) (prohibiting tolling for subsequent class actions "would likely encourage rather than discourage multiplicitous litigation").

"desire[] to represent a class." Petitioner's rule, however, would surely increase the number of duplicative class actions filed by those class members whose concern is not that they serve as class representative, but that class members are represented. *See Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 652-53 (6th Cir. 2015) ("If each unnamed member of a class that is not certified were barred from ever again proceeding by class action, each class member would have an incentive to multiply litigation by filing protective suits or motions to intervene at the outset of the initial class action suit. The weight of individual filings would strain the federal courts."), *cert. denied*, 136 S. Ct. 1163 (2016).

Applying class tolling to subsequent class actions also fosters judicial economy with respect to the subsequent actions following the denial of class treatment. If the Court adopts petitioner's rule, then after a class action fails to achieve class treatment, defendants will face a multitude of individual actions – for example, individual actions by any China Agritech shareholder with sufficient shareholdings to justify an individual action. But, if the requirements of Rule 23(b)(3) are satisfied, including "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," Fed. R. Civ. P. 23(b)(3), then the policies of Rule 23 favor allowing a class action to go forward. *See* Wasserman, 58 Fla. L. Rev. at 853 ("A successive positive-value class action brought on behalf of the entire class would expend fewer judicial resources than 999 individual lawsuits and would be far more efficient than a lawsuit with 999 individual intervenors. Thus, a decision declining to toll the statute of limitations in the context of the successive class action would appear to frustrate this Rule 23 policy [of efficiency and judicial economy].").

2. This Court's conclusion that class tolling "is in no way inconsistent with the functional operation of a statute of limitations," *American Pipe*, 414 U.S. at 554, also applies fully to subsequent class actions. "Limitations periods are intended . . . to prevent plaintiffs from sleeping on their rights, but th[is] end[] [is] met *when a class action is commenced. Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights.* Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." *Crown, Cork*, 462 U.S. at 352-53 (emphasis added; citations omitted); *accord American Pipe*, 414 U.S. at 554-55.

Petitioner repeatedly quotes that passage from *Crown, Cork* (at 28, 29, 34), but misses its point. Petitioner claims the passage (at 34) as supposed support for the proposition that "the only way formerly absent class members can continue to satisfy the diligence requirement is by filing suit to enforce their own rights." But the Court actually stated that the goal of preventing plaintiffs from sleeping on their rights is "met when a class action is commenced." 462 U.S. at 352.

In other words, class members in a timely class action do not need to take any further action to show that they have not slept on their rights because that is shown by *the timely class action itself.* Therefore, to the extent *American Pipe* is read to impose any burden of diligence to qualify for tolling, that burden is satisfied by the filing of the initial class action and does not depend on whether the subsequent action is an individual action, a mass action, or a class action.

Even if (contrary to this Court's statements in *American Pipe* and *Crown, Cork*) putative class members were required to demonstrate further diligence

after the denial of class treatment to benefit from class tolling, the filing of a subsequent class action would fulfill that requirement. Because "Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims," *Crown, Cork*, 462 U.S. at 352-53, the named plaintiff and absent class members in the subsequent class action stand on equal footing when it comes to diligence. Just as class members are entitled to rely on the initial class action, they are entitled to rely on the subsequent class action.

**3.** This Court has explained that class tolling also satisfies the purpose of statutes of limitations from the defendants' perspective. Statutes of limitations are "'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *American Pipe*, 414 U.S. at 554 (quoting *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). This "polic[y] of ensuring essential fairness to defendants ... [is] satisfied" when a timely class-action complaint "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *Id.* at 554-55; *accord ANZ*, 137 S. Ct. at 2051.

For the same reason, a timely class action provides defendants with fair notice of a subsequent class action asserting the same claims.[7] "[D]efendants cannot claim surprise or lack of notice" from "a substantively

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[7] If anything, an initial class action provides even clearer notice of a subsequent class action than a series of subsequent individual actions.

identical successive class action." Wasserman, 58 Fla. L. Rev. at 850. In considering whether notice is fair, what matters is not the procedural form of the subsequent action, but whether it "concern[s] the same evidence, memories, and witnesses as the subject matter of the original class suit." *American Pipe*, 414 U.S. at 562 (Blackmun, J., concurring). Because petitioner concedes (at 1) that this class action is "identical" to the timely filed class actions, petitioner cannot credibly claim lack of notice or unfair surprise. "Tolling the statute of limitations thus creates no potential for unfair surprise, *regardless of the method class members choose to enforce their rights upon denial of class certification.*" *Crown, Cork*, 462 U.S. at 353 (emphasis added).[8]

## III. PETITIONER'S ARGUMENTS FOR LIMITING CLASS TOLLING ARE UNPERSUASIVE

### A. Petitioner Fails To Justify A Judge-Made Equitable Limitation On Class Tolling

Petitioner argues (at 30) that this Court must impose an equitable limitation on *American Pipe* because application of class tolling to subsequent class actions fails purported requirements of "plaintiff diligence and extraordinary circumstances justifying tolling." Petitioner is incorrect on many counts.

1. Petitioner's equitable arguments cannot overcome the force of Rule 23, which "*automatically* applies" to all civil actions and "creates a categorical

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[8] Petitioner contends (at 42) that the absence of unfair surprise is not an independent basis for tolling. But as respondents have shown, tolling is justified not just by the absence of unfair surprise but by *all* of the rationales for tolling invoked by this Court in *American Pipe* and other class-tolling precedents. *See supra* Part II.C.

rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action." *Shady Grove*, 559 U.S. at 398, 400. *See supra* Part I.B. Nor can these equitable arguments overcome the "pellucid instruction" of the Rules Enabling Act, which dictates that, "where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class." *Tyson Foods*, 136 S. Ct. at 1046. *See supra* Part I.C.

**2.** In its class-tolling cases, this Court has not applied "in any direct manner" the criteria considered in other equitable tolling cases: "whether the plaintiffs pursued their rights with special care" and "whether some extraordinary circumstance prevented them from intervening earlier." *ANZ*, 137 S. Ct. at 2052. That is because many other equitable tolling cases are motivated by fairness to plaintiffs, *see, e.g.*, *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946), but the foundational rationale of class tolling is "'litigative efficiency and economy,'" *ANZ*, 137 S. Ct. at 2051 (quoting *American Pipe*, 414 U.S. at 556). To the extent considerations of diligence and extraordinary circumstances are relevant to class tolling, the application of class tolling to subsequent class actions satisfies these requirements.

*First*, as explained above, to the extent a burden of diligence exists with respect to class tolling, the timely filing of the original class action (and certainly the filing of the subsequent class action) satisfies that burden as to all class members because "Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." *Crown, Cork*, 462 U.S. at 352-53. *See supra* Part II.C.2.

No authority supports petitioner's argument (at 34-36) that a plaintiff must file an individual claim to demonstrate diligence. "The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." *Holland v. Florida*, 560 U.S. 631, 653 (2010) (citation omitted). It is unreasonable to require a class member in a subsequent class action to take the belt-and-suspenders approach of filing a duplicative individual lawsuit when that class member already is putatively represented by the class action. Moreover, such a requirement would contradict the premise of *American Pipe* – that a class action is "a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." 414 U.S. at 550.

*Second*, "extraordinary circumstances justifying tolling" exist. Pet. Br. 30. Petitioner concedes (at 30) that "avoid[ing] direct conflict with the policies underlying Rule 23" is an extraordinary circumstance that justifies tolling with respect to the individual claims of class members. Once that point is conceded, petitioner's argument vanishes not only because a live claim may be pursued through any procedures available under the federal rules, but also because, as explained above, all of the policies underlying class tolling – including furtherance of Rule 23's policies – support the application of class tolling to subsequent class actions. *See supra* Part II.C.

### B. Petitioner's Policy Arguments Are Overstated And Best Addressed Through Other Means

Petitioner warns (at 46) that applying class tolling to subsequent class actions causes "serious adverse policy consequences." Petitioner warns (at 46-48) that plaintiffs will bring "'stacked' class actions," taking

advantage of "abusive" "perpetual tolling" that will lead to "serial relitigation of class actions even when the validity of class certification has already been litigated and rejected." Petitioner's *amici* raise similar concerns. *See, e.g.*, DRI Br. 18-28; Chamber of Commerce Br. 19-25.

Any policy preference for fewer class actions does not justify repudiating this Court's precedents regarding class tolling or adopting a rule that contravenes Rule 23 and the Rules Enabling Act. *See supra* Parts I-II. The proper outlet for petitioner's policy concerns is Congress, or the process for amending the Federal Rules of Civil Procedure. *See Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1678 (2017). In any event, for the reasons explained below, petitioner's policy concerns are overstated.

**1.a.** This Court already considered and unanimously dismissed petitioner's policy concerns in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), a case in which the defendant argued that a class-certification denial should preclude subsequent class actions. The defendant argued, much like petitioner argues here, that such a rule was required because otherwise "class counsel can repeatedly try to certify the same class 'by the simple expedient of changing the named plaintiff in the caption of the complaint,'" leading to "'serial relitigation of class certification.'" *Id.* at 316 (quoting Br. for Resp. 2, 12, 47-48, *Smith*, No. 09-1205 (U.S. filed Dec. 13, 2010), 2010 WL 5125435).

The Court concluded that federal courts have mechanisms "to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs." *Id.* at 317. The Class Action Fairness Act of 2005 facilitated removal of class actions to federal court, and similar class actions can be centralized

before a single judge. *See id.* Most notably, this Court concluded that "principles of *stare decisis* and comity among courts" sufficed to address policy concerns regarding subsequent class actions, noting that "we would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute." *Id.*

**b.** Notwithstanding this Court's endorsement of comity as an effective limitation on subsequent class actions, petitioner erroneously contends (at 49) that comity is "weak at best." District court practice since *Smith*, however, demonstrates that comity is a workable mechanism for courts to adjudicate subsequent class actions.

Applying principles of comity, district courts have rejected subsequent class actions where the rationale of an earlier class-certification denial would preclude certification, while allowing subsequent class actions to proceed if the plaintiff can show that the prior class-certification denial does not demonstrate inappropriateness of class treatment of the subsequent class action. On one side, many cases deny certification using comity.[9] On the other side, courts understand

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[9] *See, e.g., McCabe v. Lifetime Entm't Servs., LLC*, No. 17-CV-908-ERK-SJB, 2018 U.S. Dist. LEXIS 3212, at *47 (E.D.N.Y. Jan. 4, 2018) (report and recommendation) (class could not be certified because "this Court would *also* be obligated to follow – whether through comity, stare decisis or the basic precept that District Courts follow the law of the circuit – the Second Circuit's decision finding that Judge Hellerstein was correct in denying certification of the same class pled here"); *Ott v. Mortgage Inv'rs Corp. of Ohio*, 65 F. Supp. 3d 1046, 1063-64, 1067 (D. Or. 2014) (applying comity to strike class allegations where "another court has denied class certification of two of the virtually same classes," and "[t]here is no reason for this court to believe that [plaintiff's] evidence will differ in this action"); *Murray v. Sears, Roebuck & Co.*, No. C 09-5744 CW, 2014 WL 563264, at *6 (N.D. Cal. Feb.

the proper role in comity-based analyses of subsequent class-certification efforts.[10] Courts also have adopted and discussed a standard for applying comity propounded by the American Law Institute ("ALI").[11]

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12, 2014) (following previous class-certification denial decision as "persuasive" and "provid[ing] strong guidance"); *Williams v. Winco Foods*, No. CV 13-00146 CRB, 2013 WL 4067594, at *2 (N.D. Cal. Aug. 1, 2013) ("Because Plaintiffs have not addressed the reasoning underlying this Court's previous denial of certification in *Gales*, the Court GRANTS Defendants' Motion to Deny Class Certification."); *Baker v. Home Depot USA, Inc.*, No. 11 C 6768, 2013 WL 271666, at *5 (N.D. Ill. Jan. 24, 2013) (striking class allegations where "many of the same problems identified by the courts in [earlier class-certification denials] with respect to class certification are similarly present in this case"); *Edwards v. Zenimax Media Inc.*, No. 12-cv-00411-WYD-KLM, 2012 WL 4378219, at *4 (D. Colo. Sept. 25, 2012) (finding past class-certification denial "highly persuasive and relevant" in granting motion to strike class allegations).

[10] *See, e.g., Ford v. Ford Motor Co.*, No. CV 13-8335 PSG (SSx), 2014 WL 12570925, at *4 (C.D. Cal. Jan. 17, 2014) (rejecting "imposing any kind of comity-based burden on Plaintiffs" because prior class action "involve[d] different legal claims"); *Heibel v. U.S. Bank Nat'l Ass'n*, No. 2:11-CV-00593, 2012 WL 4463771, at *4 (S.D. Ohio Sept. 27, 2012) (prior class-certification denial did not dictate denial in subsequent action because "it appears that Plaintiffs in this case have produced more evidence – than the plaintiff in [the prior action] – to establish that they are similarly situated to members of the potential class").

[11] *See Baker v. Microsoft Corp.*, 797 F.3d 607, 617-19 (9th Cir. 2015) (Bea, J., concurring in the result), *rev'd and remanded on other grounds*, 137 S. Ct. 1702 (2017); ALI, *Principles of the Law of Aggregate Litigation* § 2.11 (2010) ("*Principles*"). This section of the ALI's *Principles*, which this Court cited in crafting its holding in *Smith*, 564 U.S. at 316 n.11, states that "[a] judicial decision to deny aggregate treatment for a common issue or for related claims by way of a class action should raise a rebuttable presumption against the same aggregate treatment in other courts as a matter of comity." *Principles* § 2.11. The ALI noted

**c.** Where district courts follow a prior class-certification denial under principles of comity, they have procedural tools to manage the action efficiently. District courts can excise class claims at the pleading stage, *see, e.g.*, *Ott*, 65 F. Supp. 3d at 1061-70; *Baker*, 2013 WL 271666, at *4-5, and require that the pleadings be amended to eliminate class allegations pursuant to Rule 23(d)(1)(D), *see, e.g.*, *Edwards*, 2012 WL 4378219, at *2-3. A district court also can preclude class discovery when a class-certification denial on comity grounds is warranted. *See Williams*, 2013 WL 4067594, at *1-2; *Edwards*, 2012 WL 4378219, at *6.

**d.** Although petitioner erroneously paints this lawsuit as an example of abuse (at 49-50), it actually illustrates the safeguards this Court identified in *Smith* operating as intended. After Judge Klausner denied class certification in *Dean*, the *Smyth* plaintiffs originally filed in the District of Delaware, where petitioner is incorporated. JA50, 57 (¶¶ 19, 41). The district court then transferred the action to the Central District of California, where it was assigned to Judge Klausner.

This transfer gave Judge Klausner the opportunity to evaluate whether his denial of class certification in *Dean* demonstrated the inappropriateness of class certification in *Smyth* under principles of comity. He concluded that it did not. Because the *Smyth* motion for class certification addressed the specific deficiencies identified in the *Dean* motion, *see supra* p. 11, the court concluded that comity was unwarranted because "it is not clear that the reason the Court denied class

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that "[t]he expectation of this Section is that situations for rebuttal of the presumption stated here may arise more frequently than situations with respect to some other presumptions used in the law." *Id.* cmt. c.

certification in *Dean* applies equally to this case." JA264. The *Dean* class-certification denial "was based on a finding that one of the Plaintiffs' own experts had failed to demonstrate market efficiency. Plaintiffs in this action have submitted entirely new expert declarations. Given the different factual showings in each case, it would be improper to decide class certification issues based solely on comity." *Id.*

Notably, in response to the *Smyth* plaintiffs' motion for class certification, petitioner did not even argue that common issues failed to predominate over individual issues, nor did petitioner attempt to rebut the extensive statistical analysis put forward by plaintiffs' expert to prove market efficiency. *See* China Agritech Class Cert. Opp., *Smyth* Action, Dkt. 93. Instead, petitioner argued solely that the court should follow its class-certification denial in *Dean* as a matter of comity (an argument the court rejected) and that the *Smyth* class representatives failed to demonstrate typicality and adequacy (arguments the court accepted). *See id.* at 9-20; JA255-62.

These circumstances confirm that respondents' subsequent class action was appropriate, not abusive. As the ALI has concluded, application of comity to deny class treatment in a subsequent class action is inappropriate "when the basis for the earlier denial . . . is no longer present in a subsequent proceeding." *Principles* § 2.11 cmt. c. That is true here, because the reasons for denying class certification in both *Dean* and *Smyth* are absent. Respondents included allegations not included in the *Dean* complaint regarding the *Cammer* factors that the district court found unproven in *Dean*: coverage by securities analysts and the effect of corporate news on stock price. *See* JA107-09 (¶ 155h, k). Like the *Smyth* plaintiffs, respondents

would seek to prove market efficiency with expert analysis that remedied the deficiencies the district court identified in the expert reports in *Dean*. Moreover, petitioner never has contended that the typicality and adequacy issues in *Smyth*, which involved the relationship between the *Dean* and *Smyth* plaintiffs and the conduct of their shared counsel, are present in this action (filed by different counsel on behalf of different class representatives, who have no relationship with the plaintiffs from *Smyth* or *Dean*).

**2.** In light of this Court's holding in *ANZ*, the "perpetual tolling" of which petitioner warns (at 46-47) is literally impossible in this case, other securities class actions, or any other case with claims subject to a statute of repose. In *ANZ*, this Court held that statutes of repose are immune from class tolling. 137 S. Ct. at 2051. The Rule 10b-5 claims in this case are subject to a 2-year limitations period and a 5-year statute of repose, *see* 28 U.S.C. § 1658(b), and other securities claims are subject to a 1-year limitations period and a 3-year statute of repose, *see, e.g.*, 15 U.S.C. § 77m. The 5-year repose period has expired in this case, *see* JA46-47 (¶ 1) (class period ended March 11, 2011), meaning that the *Resh* class action is the last possible class action (or lawsuit of any kind) that petitioner will face. In securities class actions, the application of *American Pipe* creates no risk of "perpetual tolling," but simply creates the possibility that class tolling may extend the limitations period, until the statute of repose's cutoff, by no more than 3 years (or 2 years in cases subject to 1- and 3-year time bars).

Petitioner's arguments confuse the distinct operations and purposes of statutes of limitation and statutes of repose. According to petitioner, a statute of limitations is a "strict time limit" providing "finality" and a

"cut off" of all liability. Pet. Br. 4, 17, 21-22. Even if that statement accurately describes a statute of repose, it does not correctly depict a statute of limitations. A statute of repose "puts an outer limit on the right to bring a civil action" and serves as "a cutoff" of liability, thus "effect[ing] a legislative judgment that a defendant should be free from liability" and giving the defendant "a fresh start." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182-83 (2014). By contrast, statutes of limitations "are subject to equitable tolling," because tolling is consistent with a statute of limitations' purpose to "'promote justice by preventing surprises through [plaintiffs'] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Id.* at 2183 (quoting *R.R. Telegraphers*, 321 U.S. at 348-49) (alteration in original). Even as the Court held last Term that *American Pipe* tolling does not apply to a statute of repose, *see ANZ*, 137 S. Ct. at 2051, the Court reaffirmed that statutes of limitations are subject to *American Pipe* tolling, *see id.* at 2051-52. The fact that respondents' claims are subject to a statute of repose illustrates the inappropriateness of petitioner's attempt to import the policies behind statutes of repose into the operation of the applicable statute of limitations.

**3.** Given the effective mechanisms available to handle subsequent class actions, it is unsurprising that petitioner and its *amici* have advanced no evidence of any pattern of "abusive" subsequent class actions in any of the circuits that apply *American Pipe* to subsequent class actions. The Sixth and Seventh Circuits have applied *American Pipe* to subsequent class actions since 2015 and 2011, respectively. *See Phipps*, 792 F.3d at 644; *Sawyer*, 642 F.3d at 563-64.

The Third, Eighth, and Ninth Circuits have applied *American Pipe* to subsequent class actions in at least some circumstances for more than a decade. *See Catholic Social Servs., Inc. v. INS*, 232 F.3d 1139, 1149 (9th Cir. 2000) (en banc); *Yang v. Odom*, 392 F.3d 97, 104-08 (3d Cir. 2004); *Great Plains Trust Co. v. Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007).

In *ANZ*, the Court concluded that the plaintiff's concern that not applying *American Pipe* tolling to statutes of repose would lead to a flood of duplicative filings "likely [we]re overstated" because there had been no "evidence of any recent influx of protective filings in the Second Circuit," which had adopted the defendant's rule in 2013. 137 S. Ct. at 2054. By the same token, petitioner's failure here to offer any evidence of any influx of abusive, stacked class actions renders hollow its parade of horribles. Plaintiffs' counsel are unlikely to bring subsequent class actions when a class-certification denial makes clear that the claims could not be suitable for class treatment. *See* Pet. App. 22a ("Attorneys who are going to be paid on a contingency fee basis, or in some cases based on a fee-shifting statute, at some point will be unwilling to assume the financial risk in bringing successive suits."). Although petitioner mocks the notion of attorney "self-restraint," Pet. Br. 48, contingency class counsel are rational economic actors and have no incentive to throw good money after bad. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008) ("Lawyers must eat, so they generally won't take cases without a reasonable prospect of getting paid.").

## IV. PETITIONER'S PROPOSED LIMITATION ON CLASS TOLLING WOULD CAUSE INEQUITABLE OUTCOMES

1. Petitioner's position, not the Ninth Circuit's faithful application of *American Pipe*, would cause adverse policy consequences. Petitioner's advocacy (at 54-57) of an alternative position permitting class tolling for subsequent class actions in some circumstances is an implicit concession that its main position is overly harsh and inequitable.

There are many circumstances in which it clearly would be inequitable to deny class tolling to a subsequent class action. For example, where class certification is denied in a prior action "based solely on deficiencies of the class representative," there is no basis to deny tolling "for filing a later, substantively identical action with a new representative." *Yang*, 392 F.3d at 112 (Alito, J., concurring and dissenting). Similarly, if a class action is dismissed because the class representative is found to lack standing, class members should not be deprived of the opportunity to find a new representative with standing to represent the class. Petitioner's position also would permit class defendants to escape class liability forever by buying off a putative class representative with an individual settlement after the limitations period expires for other putative class members.

Moreover, in securities class actions, petitioner's position, taken to its extreme, could prevent the operation of the PSLRA as intended by Congress. The PSLRA requires that a class plaintiff provide notice of the class action within 20 days of filing the complaint and gives class members 60 days following notice to move for lead plaintiff status. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i). The PSLRA directs the district court,

within 90 days of the notice, to appoint the "most adequate plaintiff" as lead plaintiff. *Id.* § 78u-4(a)(3)(B)(i). If the appointed lead plaintiff is different from the named plaintiff who filed the complaint, that plaintiff must file an amended class-action complaint to represent the class.[12] The operation of the PSLRA thus depends on the notion that a previously absent class member will file a subsequent class-action complaint several months after the filing of the original class action. A defendant conceivably could argue that such a complaint would be untimely absent *American Pipe* tolling. If a court accepted that argument, petitioner's position would functionally force the court to choose the original named plaintiff as lead plaintiff, rather than the most adequate plaintiff as Congress intended.

Petitioner contends (at 41) that class tolling would be contrary to the PSLRA's policy of encouraging class representatives to come forward early "to allow the district court to pick the best lead plaintiff." But the PSLRA makes the plaintiff with the largest financial interest the presumptive most adequate plaintiff, *see* 15 U.S.C. § 78u-4(a)(3)(B)(iii), in order to incentivize large institutional investors to serve as class representatives, *see* Weiss, 61 Vand. L. Rev. at 548-50. Where a large investor has moved for lead plaintiff status and that investor has no facial inadequacies, an investor with a smaller financial interest would have no realistic chance of being appointed lead plaintiff, nor a

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[12] *See* Elliott J. Weiss, *The Lead Plaintiff Provisions of the PSLRA After a Decade, or "Look What's Happened to My Baby"*, 61 Vand. L. Rev. 543, 564 n.85 (2008).

need to seek such appointment to protect the class's interests.[13]

**2.** Petitioner's alternative position is that the Court should adopt the Third Circuit's holding in *Yang* that *American Pipe* can apply to subsequent class actions where class certification has been denied "on the basis of the lead plaintiffs' deficiencies," but not where there has been a "class-based determination" against class certification. 392 F.3d at 110-11.

Petitioner incorrectly asserts (at 57-59) that adoption of the *Yang* holding would render respondents' class claims time-barred. In the prior class action in *Yang*, the court had denied certification of a Rule 10b-5 class because of failure to prove entitlement to the fraud-on-the-market presumption. 392 F.3d at 108-09. The *Yang* court noted that, even though "the deficiencies mentioned by the court often indicate defects in the class itself," the prior court's reasoning demonstrated that the denial turned on the specific class representative's failure "to meet *his* burden" to prove entitlement to the presumption of reliance. *Id.* at 109. The same is true here. The district

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[13] In all three class actions leading up to this case, the district court failed to follow the PSLRA's command that the district court "shall appoint" the most adequate plaintiff as lead plaintiff within 90 days of publication of notice. SJA1-6, 7-11, 58-63; 15 U.S.C. § 78u-4(a)(3)(B)(i). In *Smyth*, because class notice occurred on October 8, 2012, the district court was required to make the lead plaintiff determination by January 7, 2013. Had the court done so, it could have ferreted out the *Smyth* class representatives' inadequacy before the expiration of the 2-year limitations period on February 3, 2013. An adequate class representative could then have filed a timely class action, and class members never would have needed to rely on class tolling. Petitioner's arguments regarding the proper function of the PSLRA ignore the departures from the PSLRA's requirements in this case.

court concluded in its *Smyth* decision that the class-certification denial in *Dean* was caused by deficiencies in the expert reports submitted by the *Dean* plaintiffs, and accordingly the decision did not cast doubt on the appropriateness of the underlying claims for class treatment. JA264.

In any event, petitioner's alternative position is insufficient to prevent inequitable outcomes. Many situations exist in which a subsequent class action is appropriate even after a class-certification denial that can be characterized as class-based. For example, in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), this Court held that a nationwide class in a gender discrimination lawsuit against Wal-Mart failed to satisfy Rule 23 because the plaintiffs could not show that Wal-Mart operated nationwide under a common policy of discrimination. *Id.* at 353-60. Wal-Mart employees took this Court's guidance to heart by filing a series of regional class actions, seeking to prove the existence of common discriminatory policies in more localized areas. *See Phipps*, 792 F.3d at 642.

Filing a subsequent class action to incorporate a court's guidance and remedy a deficiency identified in a prior class-certification decision upholds the rule of law and does not reflect abusive practice. "[E]ven if the problem in the initial class action is with the class itself," a subsequent class action is appropriate "as long as the complaint in the successive class action seeks to 'cure the deficiency' identified in the earlier class action." Wasserman, 58 Fla. L. Rev. at 857. As noted above, both the *Smyth* and the *Resh* class actions sought to cure the deficiency in the *Dean* class action by presenting additional allegations and expert evidence regarding market efficiency, and the district court determined in *Smyth* that the deficiency it identified in *Dean* no longer was present. *See supra* p. 11.

Rather than making the application of *American Pipe* hinge on the reason for denial of class certification in an earlier class action, comity provides the effective mechanism for district courts to determine which subsequent class actions should go forward. As petitioner's *amici* acknowledge, the distinction between class-based and representative-based class-certification denials can be elusive. *See* SIFMA Br. 20. Comity turns not on formalistic distinctions but on the district court's pragmatic consideration of whether "the basis for the earlier denial . . . is no longer present in a subsequent proceeding." *Principles* § 2.11 cmt. c.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

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February 21, 2018

# ADDENDUM

Federal Rule of Civil Procedure 23 provides, in relevant part:

**Rule 23. Class Actions**

**(a) Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

**(1)** the class is so numerous that joinder of all members is impracticable;

**(2)** there are questions of law or fact common to the class;

**(3)** the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

**(4)** the representative parties will fairly and adequately protect the interests of the class.

**(b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:

**(1)** prosecuting separate actions by or against individual class members would create a risk of:

**(A)** inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

**(B)** adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

**(2)** the party opposing the class has acted or refused to act on grounds that apply generally to the

class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

**(3)** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

**(A)** the class members' interests in individually controlling the prosecution or defense of separate actions;

**(B)** the extent and nature of any litigation concerning the controversy already begun by or against class members;

**(C)** the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

**(D)** the likely difficulties in managing a class action.

* * *

**(d) Conducting the Action.**

**(1)** ***In General.*** In conducting an action under this rule, the court may issue orders that:

**(A)** determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

**(B)** require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

**(i)** any step in the action;

**(ii)** the proposed extent of the judgment; or

**(iii)** the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

**(C)** impose conditions on the representative parties or on intervenors;

**(D)** require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

**(E)** deal with similar procedural matters.

**(2)** ***Combining and Amending Orders.*** An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

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